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Supreme Court, U.S.
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NO. 91-713

IN THE
Supreme Court of the United States
OCTOBER TERM 1991

GERARDO ACUNA CASTILLO, ET AL,
Petitioners

v.

SHELL OIL COMPANY, ET AL,
Respondents

**RESPONDENTS' BRIEF IN OPPOSITON TO
PETITION FOR WRIT OF CERTIORARI**

**To The United States Court Of Appeals
For The Fifth Circuit**

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STATEMENT OF ISSUES PRESENTED

1.

Is an order remanding a case to state court reviewable within the terms of 28 U.S.C. § 1447(a) where the district court has subject matter jurisdiction?

2.

Does the presence of a fraudulently joined forum defendant, in a matter where the district court has subject matter jurisdiction, in alleged contravention of 28 U.S.C. § 1441(b), constitute a "defect in removal procedure" within the terms of 28 U.S.C. § 1447(c)?

RULE 28.1 CERTIFICATE OF INTERESTED PERSONS AND PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

1. Shell Oil Company
2. Travelers Insurance Company and
Aetna Casualty & Surety Company
(Insurers for Shell Oil Company)
3. Dow Chemical Company
Fireman's Fund Insurance Companies
(Insurers for Dow Chemical Company)
4. Baker & Botts,
Counsel for Dow Chemical Company
5. Occidental Chemical Corporation, individually
and as successor to Occidental Chemical Com-
pany and Occidental Chemical Agricultural Pro-
ducts, Inc., National Union Fire Insurance Com-
pany of Pittsburgh, Pennsylvania, various Lloyds
of London Underwriters (Insurers for Occidental
Chemical Corporation), Occidental Chemical
Corporation
6. All of the Plaintiffs, who are Costa Rican citizens
and residents (refer to Plaintiffs' Petition)
7. Baron & Budd, P.C., Counsel for Plaintiffs
8. Castle & Cooke, Inc.
9. Dole Fresh Fruit Company, Parent and non-
wholly owned subsidiary companies are: Dole
Food Company, Inc.
10. Standard Fruit Company

11. Standard Fruit & Steamship Company
12. American International Underwriters, CIGNA Companies, R. K. Harrison, J. T. Jacobs (Insurance), Ltd., Highland Insurance Group, Central National Insurance Company, and Employers Reinsurance Company (Insurers for Castle & Cooke, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit & Steamship Company)
13. Royston, Rayzor, Vickery & Williams, L.L.P.
14. Ladels, Ripley & Diamond, counsel for Occidental Chemical Corporation

TABLE OF CONTENTS

	Page
Statement of Issues Presented	i
Certificate of Interested Persons and Parties	ii
Opinions Below	2
Jurisdiction	2
Counter Statement of the Case	2
A. Statement of Facts	2
B. Course of Proceedings and Disposition in the Two Courts Below	3
Argument	4
A. There Is No Conflict With the Decisions Of This Court	4
B. The Decisions, of the United States Court of Appeals for the Fifth Circuit Are Not Contrary to Decisions Rendered by Other Circuit Courts	8
C. No Constitutional Question is Presented	11
D. The United States Court of Appeals for the Fifth Circuit committed no reversible error and the decisions below are in con- formity with this Court's decisions and the intent of Congress	11
1. The Court below had jurisdiction to review the order of remand	11
2. The Court below properly found that Plaintiffs waived their right to file a remand motion	13
Conclusion	14

TABLE OF AUTHORITIES

Cases	Page
<i>Air Shields v. Fullam</i> , 891 F.2d 63 (3d Cir. 1989)	12, 13, 14
<i>Briscoe v. Bell</i> , 432 U.S. 404 (1977)	6
<i>Carnegie Mellon University v. Cohill</i> , 484 U.S. 343 (1988)	9
<i>Corcoran v. Andra Insurance Company</i> , 842 F. 2d 31 (2d Cir. 1988)	9
<i>Foster v. Chesapeake Insurance Company, Ltd.</i> , 933 F.2d 1207 (3d Cir. 1991), <i>cert. denied</i> , 60 U.S.L.W. 3293 (1991)	8, 9, 12
<i>Gravitt v. Southwestern Bell Telephone Company</i> , 430 U.S. 723 (1977)	6
<i>Grubbs v. General Electric Credit Corp.</i> , 405 U.S. 699 (1922)	8, 13
<i>In Re: Shell Oil Company</i> , 932 F.2d 1518 and 1523 (5th Cir. 1991)	<i>passim</i>
<i>Mesa v. California</i> , 489 U.S. 121 (1989)	10
<i>State of North Carolina v. Ivory</i> , 906 F.2d 999 (4th Cir. 1990)	8, 9
<i>Strawbridge v. Curtiss</i> , 7 U.S. (3 Cranch) 267 (1806)	5
<i>Survival Systems v. United States District Court for the Southern District of California</i> , 825 F.2d 1416 (9th Cir. 1987), <i>cert. denied</i> , 484 U.S. 1042 (1988)	12
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	10
<i>United States v. Rice</i> , 327 U.S. 742 (1946)	8
<i>United States v. United Mine Workers of America</i> , 330 U.S. 258 (1947)	10
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	7
<i>Volvo Corp. v. Schwarzer</i> , 429 U.S. 1331 (1976)	5

STATUTES

28 U.S.C. § 1441(b)	i, 12
28 U.S.C. § 1447(c)	i, 3, 4, 5, 7, 9, 11, 14
28 U.S.C. § 1447(d)	12
28 U.S.C. § 1254(1)	2
Judicial Improvements and Access to Justice Act, Public Law No. 100-702, Title VII, § 1016(b), 102 Stat. 4670 (November 19, 1988)	4

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**RESPONDENTS' BRIEF IN OPPOSITON TO
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**To The United States Court Of Appeals
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*To The Honorable Justices Of
The Supreme Court Of The United States:*

Shell Oil Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit & Steamship Company, Dole Fresh Fruit Company and Castle & Cooke, Inc., Respondents, file this Brief in Opposition to the Petition for Writ of Certiorari filed by the Plaintiffs, Gerardo Acuna Castillo, et al, and would show as follows:

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") properly granted Shell Oil Company, et al.'s Petitions for Writs of Mandamus and vacated the District Court's remand orders and order denying defendants' motion for reconsideration. The Petitioners seek review of the Fifth Circuit's judgments which are reported at 932 F.2d 1518 and 932 F.2d 1523 and are reproduced as pages 1-26 of the Petition for Writ of Certiorari. Furthermore, the District Court's opinions are reported and reprinted at Appendix, pages 27-36, to the Petition. The Fifth Circuit properly denied Motions for Rehearing and Motions for Rehearing En Banc on July 29, 1991, and the Petition for Writ of Certiorari ensued.

JURISDICTION

Jurisdiction of this Court has been properly invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

A. Statement of Facts

This Matter is one for personal injuries brought by a number of Costa Rican citizens, all residents of Costa Rica, against a number of Defendants in the District Court of Harris County, Texas. Respondents, Standard Fruit Company, Standard Fruit & Steamship Company, Dole Fresh Fruit Company and Castle & Cooke, Inc., are citizens of states other than Texas. Standard Fruit Company is a Delaware corporation with a foreign principal place of business. Standard Fruit & Steamship Company is incorporated in Delaware and has its principal

place of business in California. Castle & Cooke, Inc., is a Hawaii corporation with a California principal place of business. Dole Fresh Fruit Company is a Nevada corporation with its principal place of business in California. Shell Oil Company and Occidental Chemical Corporation are Delaware corporations with principal places of business in Texas. Complete diversity exists and the federal courts would have original jurisdiction if these cases had been filed there. Shell Oil Company and Occidental Chemical Corporation were fraudulently joined by the Plaintiffs in the State Court action in an unfounded attempt to defeat removal jurisdiction of the Federal Courts.

B. Course of Proceedings and Disposition in the Two Courts Below

It is uncontroverted that Petitioners' motion to remand were filed over thirty (30) days after filing of the Notice of Removal of these cases to the United States District Court for the Southern District of Texas, Houston Division.

After removal to the United States District Court for the Southern District of Texas, Judge Kenneth M. Hoyt and Judge James DeAnda improperly remanded these cases to the District Court of Harris County, Texas. Defendants Shell Oil Company, et al., then filed Petitions for Writs of Mandamus seeking to overturn the orders of remand and the Writs of Mandamus were properly granted and orders of remand vacated by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit specifically based its orders on 28 U.S.C. § 1447 (c), stating that because the motions for remand were filed more than thirty (30) days after removal, the

Motions were untimely. This constituted a defect in removal procedure and the Plaintiffs below waived their objection to the removal. The United States Court of Appeals for the Fifth Circuit and the district courts below never stated that they lacked subject matter jurisdiction. The Fifth Circuit found that the district court in each case had subject matter jurisdiction.

ARGUMENT

Petitioners ask this Court to grant a Writ of Certiorari on the basis that the decisions of the Fifth Circuit below are in conflict with prior decisions of this Court or that conflict exists between the Courts of Appeals. No such conflicts exist. Petitioners have failed to satisfy the requirements for review on *certiorari* and no extraordinary reason exists *under the circumstances of these cases* for the granting of the Writ by this Court.

A. There Is No Conflict With the Decisions Of This Court

Congress, in the Judicial Improvements and Access to Justice Act, Public Law No. 100-702, Title VII, § 1016 (b), 102 Stat. 4670 (November 19, 1988), modified the applicable statute, 28 U.S.C. § 1447(c). Prior to the 1988 amendment, § 1447(c) provided that:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

After the 1988 amendment (signed by the President on November 19, 1988) § 1447(c) provides as follows:

A motion to remand the case on the basis of any defect in removal procedure must be made within

thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

The Court of Appeals below found that “although Shell is a citizen of the forum state, Texas, the district court had subject matter jurisdiction, because complete diversity existed between the parties. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).” 932 F.2d at 1519 and 932 F.2d at 1525. Petitioners cannot and do not dispute that the District Court had subject matter jurisdiction because complete diversity existed. They merely contend that the Court of Appeals improperly granted the Writs of Mandamus in light of the District Court’s lack of removal jurisdiction under § 1441(b).¹

This Court has found erroneous remands such as the one before the Court today subject to review. Petitioners cite this Court to *Volvo Corp. v. Schwarzer*, 429 U.S. 1331 (1976) (Rehnquist, Circuit Justice) for the proposition that the erroneous remands by Judges Hoyt and DeAnda are not reviewable. In that case, Justice Rehnquist denied an application for a stay of a remand order. In *Schwarzer*, it appeared to a

1. Based on the plain reading of 1447(c) this Court’s inquiry should cease and the Writ be denied. The plain wording of the statute is clear; a case shall be remanded at any time before final judgment if it appears that the District Court lacks subject matter jurisdiction. However, a Motion to Remand on the basis of any defect in removal procedure must be made within 30 days after the filing of the Notice of Removal. 28 U.S.C. § 1447(c). No one disputes that the Courts below had subject matter jurisdiction; the only question is whether under the circumstances of the cases below, the failure to file the Motions to Remand within 30 days constitutes a defect in removal procedure.

legal certainty that the District Court did not have *subject matter jurisdiction*. 429 U.S. at 1332. The District Court specifically found and Justice Rehnquist noted that remand was explicitly based on an alleged erroneous finding by the Court that it did not have subject matter jurisdiction. 429 U.S. at 1333. *Schwarzer* does not conflict with the decisions below. The United States Court of Appeals for the Fifth Circuit and the District Courts below found that subject matter jurisdiction exists since there is complete diversity under the rule of *Strawbridge v. Curtiss*. Consequently, unlike the situation in *Schwarzer*, remand was not based on lack of subject matter jurisdiction.

No conflict exists with *Gravitt v. Southwestern Bell Telephone Company*, 430 U.S. 723 (1977). In *Gravitt*, this Court, in a *per curiam* opinion, found that the District Court's remand order was unreviewable since the District Court specifically found that it lacked complete diversity of citizenship. 430 U.S. at 723. In *Gravitt*, a plaintiff was a citizen of Texas and likewise a defendant was also a citizen of Texas so the Court lacked subject matter jurisdiction, *See In Re Southwestern Bell Telephone Company*, 535 F.2d 859, 860 (5th Cir. 1976), modified, 542 F.2d 297 (1976) (en banc). The *Gravitt* decision does not conflict with the case before this Court today; the Courts below have diversity jurisdiction since complete diversity under the rule of *Strawbridge v. Curtiss* exists.

The opinions below do not conflict with *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977). In footnote 13 of *Briscoe*, this Court cites *Gravitt v. Southwestern Bell Telephone Company*, 430 U.S. 723, 724 (1977), for

the proposition that “where the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand.” However, under the enumerated grounds as were in effect at the material times before the Court today, review is unavailable only where the Court below lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Under the rule of *Strawbridge v. Curtiss*, complete diversity between the parties in these lawsuits exists and the courts below had subject matter jurisdiction. Consequently, *Briscoe v. Bell* provides no support for Petitioners’ contention and supports Respondents’ point that appellate review is permitted in situations where remand is based on reasons other than lack of subject matter jurisdiction.²

The issue below was whether the right to seek a remand can be waived. This Court has long held that other than lack of original (subject matter) jurisdiction, defects in removal may be waived.³ This point is discussed further at part D, *infra*.

2. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) is clear: “. . . only remand orders issued under § 1447(c) and invoking the grounds specify therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)” 1447(c) was amended in 1988 so that now the only ground specified in 1447(c) is lack of subject matter jurisdiction. The Courts below had subject matter jurisdiction and, consequently, since the remand orders in question were not based on lack of subject matter jurisdiction but on an alleged defect under 1441(b), the District Court Orders were not immune from review under § 1447(c) and the United States Court of Appeals for the Fifth Circuit properly held that it had jurisdiction to issue, and properly issued the writs of mandamus.

3. “Long standing decisions of this Court make it clear however, that where after removal a case is tried on the merits without objection and the Federal Court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed,

In summary, the decisions below do not constitute a new rule, as Petitioners allege, nor does it conflict in any way with the prior decisions of this Court.

B. The Decisions of the United States Court of Appeals for the Fifth Circuit Are Not Contrary to Decisions Rendered by Other Circuit Courts.

Contrary to Petitioners' contentions, the Fifth Circuit's decisions below do not conflict with those of the United States Court of Appeals for the Third Circuit or the United States Courts of Appeals for the Fourth Circuit.⁴

The decisions below do not conflict with *Foster*.⁵ The issue in the courts below was whether Shell Oil Company and Occidental Chemical Corporation were fraudulently joined as defendants in an attempt to defeat the right of removal. The United States Court of Appeals

but whether the Federal District Court would have had original jurisdiction of the case had it been filed in that Court." *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1972). The Courts below had subject matter jurisdiction since complete diversity between the parties existed. As in *Grubbs*, there was and continues to be diversity jurisdiction. The case below could have been originally brought in the United States District Court for the Southern District of Texas. *Id.* at 704.

Petitioner's citation of *United States v. Rice*, 327 U.S. 742 (1946), for the proposition that Congress gives District Court the final word on removability is wrong. In *Thermtron*, this Court, while discussing *Rice* stated "we are not convinced that Congress even intended to extend carte blanche authority to the district courts to . . . remand[] cases on grounds . . . not recognized by the controlling statute." 423 U.S. at 351.

4. *Foster v. Chesapeake Insurance Company, Ltd.*, 933 F.2d 1207 (3d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3293 (1991); *State of North Carolina v. Ivory*, 906 F.2d 999 (4th Cir. 1990).

5. This Court has apparently already examined the purported conflict between the Third and Fifth Circuits and properly *denied* the petition for writ of certiorari filed in *Foster*. See 60 U.S.L.W. 3154 (1991); *cert. denied*, 60 U.S.L.W. 3292 (1991).

for the Fifth Circuit granted writs of mandamus, vacated the orders of remand, and found that the presence of forum defendants in violation of § 1441(b) is a “*defect in removal procedure*” within the meaning of the first sentence of § 1447(c), thus making the 30-day time limit for remand motions applicable. *In Re: Shell Oil Company*, 932 F.2d 1523, 1525 (5th Cir. 1991).

In *Foster v. Chesapeake Insurance Company*, 933 F.2d 1207 (3d Cir. 1991), the issue before the United States Court of Appeals for the Third Circuit was whether a forum selection clause in an insurance contract (assuming that such a clause waived the defendant’s right to remove) was an enforceable, proper ground for remand. 933 F.2d at 1214. The Court held that remand based on a forum selection clause is lawful. *Id.* at 1215. *Foster* does not conflict with the decision in *In Re: Shell Oil Company*. These cases simply address different aspects of what is a “*defect in removal procedure*” within the meaning of 28 U.S.C. § 1447(c). *Foster* held that remand consistent with a forum selection clause waiving the right to remove is not a defect in removal procedure. On the other hand, in *In Re: Shell Oil Company*, the Fifth Circuit held that the presence of forum defendants for the purpose of removal jurisdiction does constitute such a defect.⁶

6. Likewise, this Court and other courts have suggested other grounds which might not fall within the 30-day requirement. *See, e.g., Carnegie Mellon University v. Cohill*, 484 U.S. 343 (1988) (when disposition of all federal questions leaves only state law questions that might be decided as a matter of ancillary or pendent jurisdiction, case may, instead, be remanded); *Corcoran v. Andra Insurance Company*, 842 F.2d 31, 33-34 (2d Cir. 1988) (abstention found to be a legitimate non-section 1447(c) ground for remand). Significantly, the court in *Corcoran* found the remand in question was reviewable.

The United States Court of Appeals for the Fourth Circuit's decision in *State v. Ivory*, 906 F.2d 999 (4th Cir. 1990), does not conflict with the United States Court of Appeals for the Fifth Circuit's holdings in *In Re: Shell Oil Company*. In *State v. Ivory*, the Court of Appeals stated as follows:

The thirty-day limitation applies only to objections to defects in removal procedure. North Carolina's objection here is that the Court lacked subject matter jurisdiction, an objection that may be raised by the parties at any time or by the Court sua sponte.

906 F.2d at 1000 n.1. The issue before the Court in *State v. Ivory* was the lack of subject matter jurisdiction. That is the one specific statutory ground remaining after 1988 in § 1447(c) where the 30-day rule is not applicable.⁷ Lack of subject matter jurisdiction did not play a part in the orders of remand below.

This Court should leave the decisions of the Fifth Circuit undisturbed and allow the Circuit Courts to determine what constitutes a "*defect in removal procedure*". No conflicts exists between the Circuit Courts at present. Petitioners' contention that immediate involvement of this Court is necessary is unfounded. No grave political or social question is involved in this case which might prompt this Court to grant a Writ of Certiorari.⁸ In

7. The issue in *State v. Ivory* was whether certain allegations gave rise to a federal defense required to support removal under the doctrine of *Mesa v. California*, 489 U.S. 121 (1989).

8. See, e.g., *United States v. Nixon*, 418 U.S. 683, 686-7 (1974) (review before judgment granted "*because of the public importance of issues presented and need for their prompt resolution.*"); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947) (validity of contempt adjudications growing out of government seizure of coal mines).

short, there is no conflict between the Courts of Appeals and consequently, the Writ should be denied.⁹

C. No Constitutional Question is Presented.

The opinion below does not find that any statute of the United States is unconstitutional and Petitioners do not make such an allegation. Therefore, the third potential reason for granting a Writ of Certiorari is not present in the case before the Court.

D. The United States Court of Appeals for the Fifth Circuit committed no reversible error and the decisions below are in conformity with this Court's decisions and the intent of Congress.

1. The Court below had jurisdiction to review the order of remand.

The standard of review of a remand order by way of writ of mandamus was defined by this Court in *Thermtron Products, Inc. v. Hermansdorfer*.¹⁰ In *Thermtron Products*, this Court determined that the then-existing 28 U.S.C. § 1447(c) did not bar review of a remand order where the case was properly removed and the remand order was issued on grounds not specifically authorized by § 1447(c).¹¹ After the *Thermtron Products* decision, § 1447(c) was amended, effective November 19, 1988, and the amended provision increases those

9. Petitioners also ask this Court to grant certiorari merely because there is a purported conflict between some district courts. Conflict between district courts, if any, especially within the same circuit, should be left to the Circuit Courts to resolve in the first instance.

10. 423 U.S. 336 (1976).

11. *Id.* at 345.

orders which may be reviewed. As discussed in Section A, *supra*, the standard set forth in § 1447 was modified by Congress to the effect that only orders specifically based on lack of subject matter jurisdiction may not be reviewed by an appellate court by means of writ of mandamus. The courts below have subject matter jurisdiction since complete diversity within the meaning of *Strawbridge v. Curtiss* exists. Since the district courts had subject matter jurisdiction, remand could not possibly have been based on § 1447(c) and the removal was not "without jurisdiction."¹²

The Court below found that it had jurisdiction to review by way of writ of mandamus the order of remand. This is not in conflict with the United States Court of Appeals for the Third Circuit's opinion in *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207 (3d Cir. 1991). In *Foster*, the Court of Appeals for the Third Circuit specifically held that "28 U.S.C. § 1477 (d) does not bar review of the order of the district court [pursuant to a forum selection clause]."¹³ The same circuit court had previously held that it had jurisdiction to review by way of writ of mandamus a district court finding that a defendant had untimely removed the case under 28 U.S.C. § 1446(b). *Air Shields v. Fullam*, 891 F.2d 63, 64-5 (3d Cir. 1989).

Based on *Thermtron Products*, in conjunction with the 1988 amendment to § 1447, the Court below could

12. See, e.g., *Survival Systems v. United States District Court for the Southern District of California*, 825 F.2d 1416, 1418 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

13. 933 F.2d at 1211.

review by way of writ of mandamus the decisions of the district court.¹⁴

2. The Courts below properly found that Plaintiffs waived their right to file a remand motion.

The Petitioners (Plaintiffs) waived any right to seek remand since their Motions for Remand were untimely. This Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), held that the right to file a Motion to Remand may be waived due to tardiness. 405 U.S. at 702. Although *Grubbs* did not discuss a statutory time period, this Court held that by proceeding to a determination on the merits, the right to file a Motion to Remand was waived. The decision below comports with the United States Court of Appeals for the Third Circuit's decision in *Air Shields, Inc. v. Fullam*, 891 F.2d 63, where the United States Court of Appeals for the Third Circuit held that after the 30-day time limit of § 1447(c) had expired, the district court was powerless to remand a case improperly removed under § 1446 (b). *Id.* at 66.

Likewise, in line with Congress' intent, the Fifth Circuit Court of Appeals found that Plaintiffs waived improper removal under § 1441(b) as a grounds for remand. 932 F.2d at 1522-23.¹⁵

14. The remand Motion in the consolidated cases was filed after the effective date of the statute, November 19, 1988. The Court below properly determined that no prejudice results from application of the amended version of § 1447(c). 932 F.2d at 1526.

15. *Foster v. Chesapeake Ins. Co.*, *supra*, the case which Petitioners contend conflicts with the decisions below did not overrule the Third Circuit's decision in *Air Products*. In fact, the Third Circuit in *Foster* affirmatively cites the *Air Products* decision and endorses its

In summary, the Court below had jurisdiction to review the district court's remand orders by way of writ of mandamus and properly found that untimely filing of a motion to remand claiming the protection of § 1441 (b) is a defect in removal procedure which may be waived.

CONCLUSION

The case before the Court does not present special and important matters for certiorari. The review of a remand order which does not fall within the specific enumerated ground of 28 U.S.C. § 1447(c), lack of subject matter jurisdiction, was performed in conformity with the prior decisions of this Court. The decisions below were correct and, consistent with this Court's jurisprudence. There is no conflict of whether the presence of forum defendants in purported violation of § 1441(b) is a "*defect in removal proocedure.*" Finally, no constitutional questions or matters of grave social concern are presented. Accordingly, Respondents

holding. 933 F.2d at 1213. The Third Circuit in *Foster* states in pertinent part:

Accordingly as the statute is clear on its face . . . the district court was correct in holding that § 1447(c)'s requirement that "[a] motion to remand the case on the basis of any defect in removal proocedure must be made within 30 days after filing the notice of removal" applies only too motions for remand on the basis of any defect in removal procedure. . . . *Cf. Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir. 1989) (the 1988 version of § 1447(c) omits the previously "improvidently removed" grounds for removal and restricts the time for remand motions based oon proocedural defects") . . . 933 F.2d at 1213.

respectfully submit that the discretionary Petition for Writ of Certiorari must be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this ²⁷~~27~~ day of November, 1991, I have served three true and correct copies of the foregoing Opposition to Petition for Writ of Certiorari on the following counsel in this case by placing same in the United States Mail, Certified Mail, Return Receipt Requested, in a properly addressed package, with adequate postage as follow:

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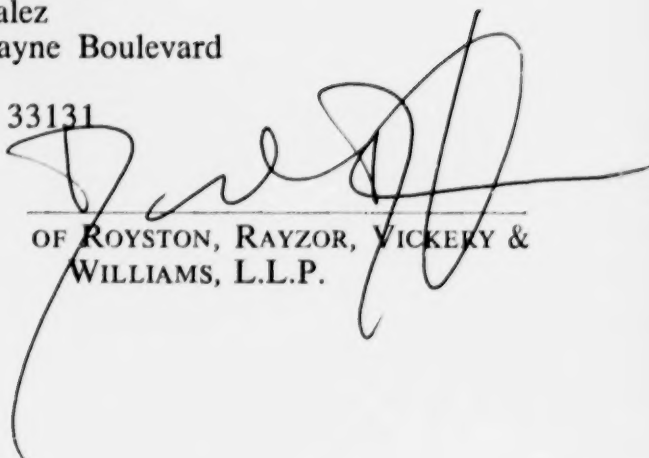
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